FORM NLRB-5026
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UNITED STATES GOVERNMENT
National Labor Relations Board

JOPES PLEASE

Memorandum

RELEASE

TO : Gerard P. Fleischut, Director
Region 26

DATE: MAR 2 7 1986

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT: Morrison-Knudsen Company, Inc.
26-CE-8, 26-CE-9, 26-CE-10,
26-CE-11, 26-CE-12; 26-CA-11428
26-CA-11429

584-1225-2500
584-1225-6700
584-3740-1700
584-5000
584-5014
584-5028
584-5042
590-2500
590-2550
590-2550-5000

These cases were submitted for advice as to whether a pre-hire agreement is valid under Section 8(f) of the Act and whether certain clauses thereof are privileged by the construction industry proviso to Section 8(e).

FACTS

In the fall of 1985, 1/ Morrison-Knudsen Company, Inc. (the Employer) was selected by The Saturn Corporation (Saturn) to be the construction manager for the construction of an automobile manufacturing facility in Spring Hill, Tennessee. The Employer then met with representatives of the Building and Construction Trades Department of the AFL-CIO as well as International and Local Unions (the Unions) to negotiate a project agreement for the site. On October 8, the Employer met with interested local contractors in Tennessee to discuss the bidding process at the Saturn facility. The Employer told the contractors that, as construction manager, it would not be doing any jobsite work; rather, all the construction work was going to be contracted out. The Employer indicated that it would be acting as the agent of Saturn in administering construction activities at the site and in subletting contracts, and that any employees it hired would be administrative, engineering, clerical, and guards. In addition, the Employer told the contractors present that there would be a project agreement covering work at the site. The execution contractors (contractors awarded a bid) would be required to sign this agreement. On October 16, the Employer wrote to these contractors, soliciting further information for the purpose of evaluating and "prequalifying" bidders for various phases of the project. Once again, the letter informed the contractors that the Spring Hill facility would be constructed under a project agreement and noted that "[i]f awarded a contract, you will be required to become signatory to this labor agreement," but that "this agreement does not exclude open or merit shop contractors from participating in this project."

1/ All dates are in 1985, unless otherwise noted.

On November 1 the Employer executed a project agreement (the Project Agreement) with the Unions. The Project Agreement applies only to construction work at the Spring Hill, Tennessee, site and binds all execution contractors to its terms. In addition, each execution contractor agrees to recognize the Unions as the sole and exclusive bargaining representatives for all craft employees on the project.

At the time the Project Agreement was executed, the Employer had hired no employees. However, it now appears that the Employer's present plans are to hire two carpenters for work on the jobsite, and it intends to hire more craft employees to perform a major portion of the excavation work on the jobsite. 2/ The Employer contends that, based on past experience, it always expected that it would have to hire craft employees at some point during the construction project due to one or more of the following circumstances: a default by a subcontractor, an unsatisfactory or incomplete performance by a subcontractor, the receipt of uneconomical bids demonstrating that the Employer itself could perform the work more cheaply, minor jobs not worth bidding, clean-up work, and the avoidance of jurisdictional disputes. Indeed, the Project Agreement does not preclude the Employer from acting as an execution contractor. Thus, Section 5, which specifically excludes certain areas from the scope of the Agreement, excludes "[a]ll employees of the Construction Manager not performing manual labor," but does not exclude other construction employees of the Employer.

ACTION

It was concluded that the instant charges should be dismissed, absent withdrawal.

The Charging Party first argues that the Project Agreement is not a valid Section 8(f) agreement because the Employer will not employ craft employees at the Spring Hill job site. However, as noted above, the Employer has hired two carpenters at the jobsite and intends to hire more employees pursuant to its decision to become an execution contractor for excavation work at the site. These employees will be doing construction work and will be covered by the Project Agreement. The very nature of a Section 8(f) agreement means that the employer intends to hire craft employees to work on the jobsite at some time during project construction. In this regard, we would distinguish Squillacote v. Racine Trades Council, 483 F. Supp 1218 (E.D. Wisconsin 1980), which indicated that a pre-hire agreement would be unlawful if the signatory employer (a general contractor) intended to hire only non-craft employees. The court noted in Racine Trades Council that the signatory's employees were not "employees whom [the unions] might represent in the future," 483 F. Supp. at 1222. Consequently, it could not be argued that the unions in that case had a representational interest in seeking a pre-hire agreement with the general contractor. By contrast, the Employer in the instant cases does plan to hire employees whom the Unions traditionally represent and will represent.

2/ Should the Region determine that these factual assertions regarding the Employer's plans are not correct, the instant cases should be resubmitted.

The Charging Party also argues that the agreement is not valid under Section 8(f) because, it argues, the Employer is not engaged primarily in the construction industry. Board law makes it clear that if an employer's overall operations include a substantial amount of revenue from construction work, then the employer is "an employer engaged primarily in the building and construction industry" and is therefore qualified to enter into a Section 8(f) agreement. Painters Local 1247 (Indio Paint and Rug Center), 156 NLRB 951, 960 (1966). Moreover, even if an employer is not generally engaged in the construction industry, it can nonetheless fall within Section 8(f) if it is engaged in construction work at a particular project. Teamsters Local 83 (Stanley J. Matuszak), 243 NLRB 328, 331 (1979); Zidell Explorations, Inc., 175 NLRB 887, 888-889 (1969). We have concluded that the Employer in the instant cases meets these standards. Not only is the Employer recognized nationally as a major construction company, but with respect to the Saturn site, the Employer will take an active role in the construction process. As construction manager, the Employer will oversee the general construction of the project, select or effectively recommend the selection of execution contractors, and perform construction work with its own craft employees. Accordingly, the Employer is an employer engaged primarily in the building and construction industry at the Saturn facility. It follows that Section 8(f) protects the agreement from illegality under Section 8(a)(2).

Finally, the Charging Party argues that the union signatory clause of the project agreement is not protected by the construction industry proviso to Section 8(e) because the Employer in the instant case is not "an employer in the construction industry," and the Project Agreement was not entered into within the context of a collective bargaining relationship. As to the former contention, the Charging Party argues that the Employer is not the real party of interest to the Project Agreement, but that it executed that Agreement only as an agent of Saturn. Concededly, it appears that Saturn made the decision that the Spring Hill facility would be constructed pursuant to a project agreement, and Saturn has the final authority as to which contractors will actually be awarded the project bids. However, the essential point is that the Employer, and not Saturn, is the signatory to the project agreement. The fact that the Employer may have entered into the agreement at the direction of Saturn does not alter the fact that the Employer is the signatory.

The Charging Party also argues that, even if the Employer is the actual signatory (which we believe it to be), there is no proviso protection because the Employer is not engaged in the construction industry. In our view, as discussed below, the Employer's role in regulating the labor relations at the jobsite is more than sufficient to invoke the protection of the construction industry proviso. The Employer is a major general contractor with construction contracts throughout the United States. Where, as here, an employer's principal business is in the construction industry, no further analysis is necessary in order to deem it to be "an employer in the construction industry" for purposes of Section 8(e). See United Brotherhood of Carpenters and Joiners of America (Longs Drug Stores, Inc.), 278 NLRB No. 62, ALJD at 7-8 (1986). Under that test, the Employer is clearly engaged in the construction industry. Further, even if an employer's principal business is

not in the construction industry, but it acts as its own general contractor on a specific construction project, the Board may nonetheless find proviso protection, depending upon "the degree of control over the construction site labor relations it [the general contractor] elects to retain." Carpenters (Longs Drug Stores, Inc.), supra, ALJD at 8. See also Los Angeles Building and Construction Trades Council (Church's Fried Chicken), 183 NLRB 1032 (1970). Even under this analysis, the Employer herein has retained sufficient control over labor relations at the jobsite to qualify for the Section 8(e) proviso. Thus, in the instant case, while it appears that Saturn ultimately determines who will be awarded the contracts at the site, the Employer is responsible for soliciting all bids and making recommendations to Saturn concerning who should be awarded those bids. In addition, the Employer is the signatory to the subcontracts with the execution contractors. It is ultimately responsible for the administration of the Project Agreement and for the performance of all the execution contractors on the jobsite. Under these circumstances, the Employer is clearly "an employer in the construction industry."

As to the contention that the agreement is not in the context of a collective bargaining relationship, we note that the construction industry proviso to Section 8(e) authorizes the negotiation of union signatory clauses by a union and a construction industry employer in the context of a collective bargaining relationship. Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 633 (1975). A Section 8(f) pre-hire agreement voluntarily entered into satisfies this requirement. Los Angeles Bldg. and Const. Trades Council (Donald Shriver, Inc.), 239 NLRB 264, 267-69 (1978), enfd. 635 F.2d 859, 872-876 (D.C. Cir. 1980), cert. denied 451 U.S. 976 (1981). See also A. L. Adams Construction Co. v. Georgia Power Co., 557 F. Supp. 168, 174-177 (1983); affd. 733 F.2d 853, 856-858 (11th Cir. 1984), cert. denied 105 S. Ct. 2155 (1985). In the instant cases, we note that the Employer intends to hire construction employees, and intends to cover them with a collective bargaining agreement. Thus, the requirement of a collective bargaining relationship is satisfied.

Accordingly, the instant charges should be dismissed, absent withdrawal.

H. J. D.